

# State of Colorado



Bill Owens  
*Governor*

Kristin F. Rozansky  
*Board Director*

State Personnel Board  
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## Meeting Minutes August 16, 2005

The State Personnel Board met in public session on Tuesday, August 16, 2005, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

The meeting was called to order at approximately 10:30 a.m. Board members Troy Eid, Donald J. Mares, and John Zakhem were present in person. Elizabeth Salkind was present via teleconferencing. Diedra Garcia arrived at approximately 10:35 a.m.

Kristin F. Rozansky, Board Director; Assistant Attorney General Pam Sanchez, Board Counsel; and Jane Sprague, General Professional III, were present in person.

## **ANNUAL ELECTION OF BOARD CHAIR AND VICE-CHAIR FOR FISCAL YEAR 2005 – 2006**

Mr. Eid moved and nominated Mr. Zakhem for Chair of the Board for Fiscal Year 2005-2006. Mr. Mares seconded the motion. The nominations for Board Chair were closed by consensus. The nomination of Mr. Zakhem as Board Chair passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem. Ms. Garcia was absent for this portion of the meeting.

Mr. Zakhem moved and nominated Ms. Garcia for Vice-Chair of the Board for Fiscal Year 2005-2006. Mr. Eid seconded the motion. The nominations for Board Vice-Chair were closed by consensus. The nomination of Ms. Garcia as Board Vice-Chair passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem. Ms. Garcia was absent for this portion of the meeting.

### **I. REQUESTS FOR RESIDENCY WAIVERS**

#### **A. August 1, 2005 Report on Residency Waivers**

Director Rozansky reported that there was one pending request for a residency waiver for which she will be reviewing this month. She further reported that she granted a one-year extension of for a residency waiver request from Colorado State University (CSU) for out-of-state positions at CSU's Center for Ecological Management of Military Lands.

## **II. PENDING MATTERS**

- A. Benjamin Vialpando v. Department of Transportation, State Personnel Board case number 2005G002.

Mr. Zakhem declared a conflict with this case, recused himself from participation in the discussion and voting, and left the meeting room. Board Counsel Sanchez addressed Complainant's written request for an explanation of Mr. Zakhem's recusal from participation in the discussion and voting, which had occurred during the May, June, and July Board meetings, leaving only two Board members to consider the case. Ms. Sanchez stated that a conflict on the part of a Board member does not have to be explained and that the 90-day rule for a decision by the Board does not apply to petitions for discretionary hearings filed prior to July 1, 2005.

Ms. Salkind moved to deny Complainant's Request for Oral Argument. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, and Ms. Salkind. Mr. Zakhem abstained from voting.

Following a discussion of Complainant's assertions that he met the minimum qualifications for the positions of Engineering/Physical Science Technician and General Professional, Ms. Salkind moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, and Ms. Salkind. Mr. Zakhem abstained from voting.

- B. Freddie L. Montoya v. Colorado State University at Pueblo, State Personnel Board case number 2005B059.

Ms. Salkind moved to deny Complainant's Request for Oral Argument. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

## **III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD**

- A. Betty Pinkerton v. Department of Transportation, State Personnel Board case number 2003B115.

Director Rozansky recused herself from participation in the discussion of this case and left the meeting room. Board Counsel Sanchez explained that the Board had adopted the Initial Decision of the Administrative Law Judge at its July 19, 2005 meeting, and therefore, Respondent's Request that the Board Dismiss Complainant's Appeal and Affirm the Initial Decision of the Administrative Law Judge was rendered moot by that decision. Thus, no motions were made and no votes were taken.

B. Randy Pfaff v. Department of Corrections, State Personnel Board case number 2004B112(C).

With regard to Complainant's Motion to Dismiss or, in the Alternative Motion for Extension of Time; Request for Sanctions, Director Rozansky explained that the complete transcript of the hearing was filed after the motion to dismiss was filed, rendering this motion moot. Board Counsel Sanchez stated that the failure to file a designation of record is not jurisdictional and no harm or prejudice inures to Complainant. Nevertheless, Mr. Eid moved to deny Complainant's Motion to Dismiss or, in the Alternative Motion for Extension of Time; Request for Sanctions. Ms. Salkind seconded the motion. Mr. Mares noted that Complainant's brief did not address the transcript issue. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

Ms. Salkind initially moved to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to adopt the Initial Decision. Mr. Mares seconded the motion. However, after discussion of the issues as delineated in the Conclusions of Law, it was determined that a separate vote should be taken with regard to the findings of fact and conclusions of law. Withdrawing her first motion, Ms. Salkind then amended her motion, moving to adopt only the findings of fact of the Administrative Law Judge. Mr. Eid seconded that motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, and Ms. Salkind. Mr. Zakhem voted in opposition to the motion.

Turning next to the Conclusions of Law as separate issues, Ms. Salkind moved to adopt Conclusion of Law No. 1 ("The Corrective Action was not arbitrary, capricious, or contrary to rule or law"). Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem. Ms. Garcia voted in opposition to the motion.

Ms. Salkind moved to adopt Conclusion of Law No. 2 ("Complainant did not commit the acts upon which discipline was based"). Mr. Mares seconded the motion. Mr. Zakhem noted that the ALJ upheld the

corrective action and, in his view, the employee's failure to do the training mandated by the corrective action was disciplinable, and he had no problem with the timesheet issues not being investigated. The motion then failed on the opposition vote of the following Board members: Mr. Eid, Ms. Garcia, and Mr. Zakhem. Mr. Mares and Ms. Salkind voted in the affirmative. Thus, Conclusion of Law No. 2 was reversed.

Mr. Eid moved to reverse Conclusion of Law No. 3 ("Respondent's demotion of Complainant was arbitrary and capricious and contrary to rule or law"). Mr. Zakhem seconded the motion, stating that Complainant failed to follow through on the corrective action, giving the appointing authority grounds for discipline. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, and Mr. Zakhem. Mr. Mares and Ms. Salkind voted in opposition to the motion. Conclusion of Law No. 3 was reversed.

Mr. Mares stated that the award of attorney fees to Complainant is supportable in the record, and Ms. Salkind remarked that Respondent did not follow proper procedure, making it difficult for Complainant to have an R6-10 meeting and to contact counsel. Mr. Zakhem disagreed, stating that given that the agency prevailed on other issues, Respondent's actions could not have been frivolous and it had a legal basis for those actions.

Following the discussion of an award of attorney fees and the concept of willful disregard of a Board rule as bad faith *per se*, as exemplified in *Mayberry v. University of Colorado Health Sciences Center*, 737 P.2d 427 (Colo. App. 1987), Mr. Eid moved to reverse Conclusion of Law No. 4 ("Complainant is entitled to an award of attorney fees and costs incurred in appealing the demotion"). Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, and Mr. Zakhem. Mr. Mares and Ms. Salkind voted in opposition to the motion. Conclusion of Law No. 4 was reversed.

#### **IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING**

There were no Preliminary Recommendations of the Administrative Law Judges or the Director to grant or deny petitions for hearing this month.

#### **V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR**

- A. Terry Lee Smaaland v. Regents of the University of Colorado, University of Colorado at Colorado Springs, Facilities Services, State Personnel Board case number 2005B107 (July 11, 2005).

Complainant, a grounds supervisor, appealed the five percent reduction in his pay by Respondent, seeking back pay, benefits and attorney fees and costs. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including failure to complete the vehicle conversion work assignment and failure to purchase a spray gun. Although the ALJ concluded that Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law, and attorney fees are not warranted, the ALJ also found that the discipline imposed was not within the range of reasonable alternatives as it was a permanent reduction in pay. The ALJ modified the disciplinary pay reduction to a five percent reduction in pay per month for one year.

- B. Elaine Lanphier v. Department of Public Health and Environment, Laboratory Radiation Services, State Personnel Board case number 2003B017 (August 1, 2005).

Complainant, an administrative assistant, appealed her administrative termination by Respondent, alleging discrimination based on her disability and seeking reinstatement to a position outside the division or front pay and front benefits, prehearing and post-hearing interest on any award of back pay and benefits, and attorney fees and costs. Respondent requested affirmance of the appointing authority's action and attorney fees and costs. After hearing, the ALJ found that Complainant is a disabled person within the meaning of the ADA, Complainant was otherwise qualified for her position, and Complainant was terminated from her position because of her disability. However, the ALJ found that Complainant did not request reasonable accommodation as she did provide meaningful information regarding her request and, therefore, did not engage in the interactive process; Respondent's action was not arbitrary, capricious, or contrary to rule or law; and attorney fees are not warranted.

## **VI. REVIEW OF THE MINUTES FROM THE JULY 19, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD**

Ms. Garcia moved to approve the minutes of the July 19, 2005 meeting as submitted. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, and Mr. Zakhem. Mr. Eid and Mr. Mares abstained as they were not present at the July 19, 2005 meeting.

## **VII. ACKNOWLEDGMENTS**

**DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS JULY 19, 2005 PUBLIC MEETING:**

- A. David Teigen v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2003B127.

The Board voted to deny the Petition for Reconsideration of the Board's Decision in Light of Newly Decided Court of Appeals Case.

- B. Gilin S. Jones v. Department of Corrections, Rifle Correctional Facility, State Personnel Board case number 2003B082.

The Board voted to adopt the findings of fact and conclusions of law of the Initial Decision and to adopt the Initial Decision of the Administrative Law Judge.

- C. John L. Deelman v. Department of Education, Colorado School for the Deaf and the Blind, State Personnel Board case number 2005B020.

The Board voted to adopt the Dismissal Order.

- D. Iris Hawkins v. Department of Corrections, Youthful Offender System, State Personnel Board case number 2004B120.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision and to adopt the Initial Decision of the Administrative Law Judge.

- E. Pam Cress v. Department of Human Services, Office of Performance Improvement, Employment Affairs Division, State Personnel Board case number 2005B011.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision and voted to adopt the Initial Decision of the Administrative Law Judge.

- F. Kristina Lanoue v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2005B044.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge but reversed the Conclusions of Law No. 2-“ Complainant is entitled to an award of attorney fees and costs.” The Board reversed this Conclusion of Law on the grounds that based upon the factual findings in this matter, attorney fees are not warranted. The Board further voted to deny the Motion for Contempt Citation due to lack of jurisdiction.

- G. LaVonne Taylor v. Department of Education, Colorado School for the Deaf and the Blind, State Personnel Board case number 2004G029.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the Petition for Hearing.

**VIII. REPORT OF THE STATE PERSONNEL DIRECTOR- Jeff Schutt, Director, Division of Human Resources - Total Compensation Survey**

Mr. Schutt reported that each year the Department of Personnel and Administration (DPA) compiles data from the Front Range and releases the survey results in August, to become effective the following July 1. All funds regarding salaries and benefits of the state are \$137 million behind the prevailing market, which can be factored down to \$90 million. There is a need to adjust upward all occupational ranges 2.8% on average, base pay .84%, and bonuses 1.25%; to bring medical and dental up to prevailing rates, \$37 million is needed. The goal is to bring the state up to 75% of prevailing rates; for this, \$14 million is needed. The state is currently at 66% of prevailing rates for its contribution to medical and dental. In terms of hiring, the state is 2-10% too low and needs to raise all minimum ranges about 2%, since private employers do not hire at the bottom of the range, although state statutes require hiring at the minimum salary. When asked to comment about Referendums C and D, Mr. Schutt stated that the projected budget shortfall is \$200-250 million, making it impossible to put the necessary increases into the budget. In addition, in the next five years, one-third of the workforce will be eligible for retirement, and the current average hiring age is 41 years of age.

**IX. ADMINISTRATIVE MATTERS & COMMENTS**

**A. ADMINISTRATIVE MATTERS**

- End-of-Year 04-05 Budget and Expense Report

Mr. Zakhem stated that the budget was "right on the money," with approximately \$7,000 left over.

- Cases on Appeal to the Board and to Appellate Courts

**B. OTHER BOARD BUSINESS**

- Results of Election for Board Member - Mr. Mares was elected.
- Judicial Performance Commission

With assistance from Paul Farley, Deputy Executive Director of DPA, Director Rozansky led the discussion on the Commission, stating that 3-member panels are to be mixed to comprise 6-member panels, each reviewing two written decisions, listening to two days of hearing, and

surveying consumers for a rating on each of the 20 Office of Administrative Court (OAC) Administrative Law Judges (ALJs) and 3 Board ALJs. However, the Commission's report is not binding and the Board may opt out of the Commission's process at any time. Ms. Rozansky would use the Commission's results as a tool in evaluating two aspects of performance - an ALJ's written decisions and courtroom demeanor. Mike Williams, Director of OAC, is an *ex officio* member of the Commission. As for Board appointments to the Commission, there have already been appointments to the Commission of reasonable, credible jurists and others. Mr. Farley noted that the Bylaws have already been changed to pertain to the Board ALJs and the participation of the Prehearing ALJs, PUC ALJs, and ICAP ALJs is also a possibility. Mr. Farley stated that the Commission is a "blue ribbon panel" which can fairly and adequately judge the ALJs in a process analysis. Board appointments may be able to be made next year; the Board may come into the Commission now, but probably not mid-cycle. Mr. Eid moved that the Board participate in the Judicial Performance Commission. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

- Staff Activities

Director Rozansky reported in the past month the budget narrative was prepared and Andrea Woods helped tremendously with procuring budget information. In addition, two new ALJs have been hired, Hollyce Farrell and Denise DeForest, at .6 FTE each, to work a staggering schedule with Mary McClatchey, so each ALJ will be in the office three days per week and all ALJs will be in on Wednesdays. In addition, the Director attended the Human Resources Network meeting and discussed the early disclosure rules with human resources personnel. Finally, the Director recognized Jane Sprague for her help in handling "glitches" which arose during the recent Board elections.

- Change of Meeting Location

In addition to the change in meeting location from the Department of Transportation to the Board's new offices at 633 17th Street, Board members agreed to change the start time of the meetings to 9:00 a.m., unless Ms. Salkind is able to fly to Denver for the meeting. In that case, the meeting would start at 10:30 a.m.

Mr. Eid expressed a desire to invite Jeff Wells to present at the next Board meeting. Ms. Garcia noted that he has a standing invitation to present, as one of the parts of the meeting is labeled, "Report of the State Personnel



Director." Mr. Farley stated that he would communicate the invitation to Mr. Wells to present at the next Board meeting in September.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

There were no comments from attorneys, employee organizations, personnel administrators, or the public.

**X. EXECUTIVE SESSION**

A. Case Status Report

B. Minutes of the July 19, 2005 Executive Session

The meeting adjourned by consensus.

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**APPROVED THIS 20th DAY OF SEPTEMBER, 2005.**

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John Zakhem, Chair

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Troy Eid, Member

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Diedra Garcia, Member

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Donald J. Mares, Member

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Elizabeth Salkind, Member